

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE REQUEST FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF 2005 PA 71

SC Docket No. 130589

BRIEF AMICUS CURIAE OF GOVERNOR JENNIFER M. GRANHOLM

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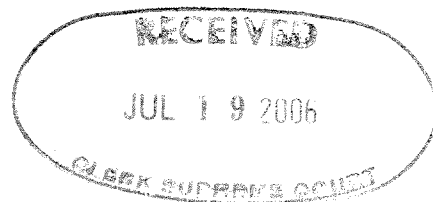


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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae is the Governor of the State of Michigan. Const 1963, art 5, § 1 vests the executive power of the State of Michigan in the Governor. The Governor is obligated under Const 1963, art 5, §8, to take care that the laws of the State of Michigan be faithfully executed and may initiate court proceedings in the name of the State of Michigan to enforce compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty, or right by any officer, department or agency of the State of Michigan or any of its political subdivisions. Given these constitutional obligations, the Governor has an abiding interest in ensuring the administration of state election laws in a manner that is consistent with constitutional mandates.

STATEMENT OF THE BASIS OF JURISDICTION

Const 1963, art 3, § 8, provides:

Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

On February 22, 2006, the House of Representatives adopted HR 199 of 2006 (HR 199), one day after its introduction. 2006 Journal of the House 290 (No. 18, February 22, 2006).¹ HR 199 provides, in pertinent part:

Resolved by the House of Representatives, That we request the Michigan Supreme Court to issue an opinion, pursuant to Article III, Section 8 of the Michigan Constitution, on the following important question of law: Do the photo identification requirements contained in 2005 PA 71 violate either the Michigan Constitution or the U.S. Constitution; and be it further

Resolved, That copies of this resolution and a copy of 2005 PA 71 be transmitted to the Michigan Supreme Court.

2005 PA 71 was given immediate effect as authorized under Const 1963, art 4, § 27. 2005 Journal of the House 890 (No. 56, June 16, 2005); 2005 Journal of the Senate 1098 (No. 64, June 30, 2005). Details regarding the effective date of the law were set forth in “enacting sections” included within 2005 PA 71. Enacting Section 2 of 2005 PA 71 provides, “Section 641(4) of the Michigan election law, 1954 PA 116, MCL 168.541, as amendatory act, takes effect 70 days after the date this amendatory act is enacted.”² Enacting Section 3 of 2005 PA 71 provides:

Sections 31, 476, 501, 507, 523, 552, 961, and 961a of the Michigan election law, 1954 PA 116, MCL 168.31, 168.476, 168.501, 168.507, 168.523, 168.552,

¹ The Journal of the House of Representatives indicates only that HR 199 was adopted, not the number of members of the House of Representatives voting affirmatively on the question of adoption of the resolution. 2006 Journal of the House 290 (No. 18, February 22, 2006).

² 2005 PA 71 was enacted on July 14, 2005.

168.961, and 168.961a, as amended by this amendatory act take effect January 1, 2007.

On order of this Court issued April 26, 2006, the request by the House of Representatives for an advisory opinion on the constitutionality of the photo identification requirements contained in 2005 PA 71 was considered and granted.

STATEMENT OF QUESTION INVOLVED

1. Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face violate either the Michigan Constitution or the U.S. Constitution?³

Amicus Curiae answer: Yes.

³ *Amicus Curiae* notes that this Court's statement of the question submitted differs from the question actually submitted to this Court by the House of Representatives. HR 199 of 2006 asks the Court to issue an opinion on the following question, "Do the photo identification requirements contained in 2005 PA 71 violate either the Michigan Constitution or the U.S. Constitution." 2006 Journal of the House 276-277 (No. 17, February 21, 2006).

STATEMENT OF FACTS

2005 PA 71 republished the photo identification requirements originally enacted under 1996 PA 583 without alteration or amendment. 1996 PA 583 was enacted on December 31, with an effective date of March 31, 1997. Among other things, 1996 PA 583 amended Section 523 of the Election Law to insert the following phrase in the first sentence of the subsection:

presenting an official state identification card issued to that individual pursuant to Act No. 222 of the Public Acts of 1972, being sections 28.291 to 28.295 of the Michigan Compiled Laws, an operator's or chauffeur's license issued to that individual pursuant to the Michigan Vehicle Code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws, or other generally recognized picture identification card and by

The eight and ninth sentences of § 523(1) also were added under 1996 PA 583 and provided:

If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727.

Under these photo identification requirements, at each election before being given a ballot, each registered voter must identify himself or herself by presenting: (1) an official state identification card issued to the voter under 1972 PA 222; (2) an operator's or chauffeur's license issued to the voter under the Michigan Vehicle Code, MCL 257.1 *et seq*; or (3) other generally recognized picture identification card. If the voter does not have the required photo identification, he or she is required to sign an affidavit to that effect before an election inspector. If the voter complies, the voter must be allowed to vote but may be subjected to a challenge under MCL 168.727. The photo identification requirements do not expressly state what happens if a registered voter is not in possession of photo identification at the polling place.

On January 1, 1997, Attorney General Frank J. Kelley, acting pursuant to MCL 14.32, opined that the photo protection requirements under 1996 PA 583, § 523(1) violated the Equal

Protection Clause of US Const, Am XIV. OAG, 1997-1998, No 6930, p 1 (January 29, 1997).

As a result of the issuance of that opinion, the amendments to 1996 PA 583, § 523(1) relating to photo identification requirements were neither implemented nor enforced by officials within the executive branch of state government or by local election officials. Michigan voters, like registered voters in a majority of other states, never have been required to present any form of photo identification as a condition of voting.

2005 PA 71 was enacted on July 14, 2005, to provide for numerous amendments of the Election Law. While 2005 PA 71 amended other provisions of § 523(1) of the Election Law, the provisions of that subsection relating to the production of identification cards by voters appearing to vote at an election contained in the first, eight, and ninth sentences of 1996 PA 583, § 523 were not amended. As required by Const 1963, art 4, § 25, 2005 PA 71 republished the photo identification requirements originally enacted under 1996 PA 583, without alteration or amendment. The photo identification requirements remain unchanged and identical to those first enacted under 1996 PA 583, § 523 and found unconstitutional by Attorney General Kelley in 1997.

ARGUMENT

This brief addresses the constitutionality of the photo identification requirements first enacted under 1996 PA 583, § 523(1), found unconstitutional in OAG, No 6930, *supra*, and republished without alteration or amendment in 2005 PA 71, § 523(1)⁴. Nothing has changed in the decade since Attorney General Kelley issued OAG, No 6930, *supra*, to alter the analysis that the photo identification requirements under § 523(1) are unconstitutional. If implemented, the requirements would infringe upon a paramount and fundamental constitutional right—the right to vote, which is guaranteed by the Michigan Constitution. The requirements would have the unfortunate effect of disenfranchising those without government-approved photo identification cards, often the poorest of our citizens, along with the elderly, the disabled, racial and ethnic minorities, and others who, though fully eligible, registered, and qualified to vote, lack state-approved photo identification and are unable to obtain one. Disparate treatment of citizens, including those with or without photo identification, violates the Equal Protection Clauses of the Michigan and U.S. Constitution. The lack of standards under § 523(1) for use of “generally recognized picture identification cards” could lead to arbitrary enforcement by election officials in violation of the Due Process Clauses of the Michigan and U.S. Constitutions. Finally, the photo identification requirements constitute an indirect and constitutionally prohibited poll tax.

I. The photo identification requirements under § 523(1) impose unauthorized conditions on the fundamental right to vote recognized by the Michigan Constitution.

⁴ *Amicus Curiae* also believes that the photo identification requirements under § 523(1) conflict with the Civil Rights Act, MCL 37.2101 *et seq* and the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*. This brief does not address that argument, which is detailed in the amicus brief submitted by the Michigan Civil Rights Commission and the Michigan Department of Civil Rights. *Amicus Curiae* adopts by reference the arguments set forth in the brief of the Michigan Civil Rights Commission and Michigan Department of Civil Rights arguing that the photo identification requirements under § 523(1) violates Michigan Civil Rights Law.

Because the right to vote is a fundamental right under the Michigan Constitution, any burdening of that right must withstand strict scrutiny. The photo identification requirements included under § 523(1), on their face, fail that test. No compelling state interest is advanced by restricting the ability to vote by imposing a photo identification requirement.

A. The right to vote is a paramount and fundamental constitutional right under the Michigan Constitution.

Any analysis of the propriety of impediments to the exercise of the right to vote under state law, such as those imposed under § 523(1), must begin with the Michigan Constitution, which in turn begins with a declaration of the fundamental right to the exercise of political power by the people: “All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.” Const 1963, art 1, § 1. In Michigan, the people are sovereign. Officials serving the people in the legislative, executive, and judicial branches of government only exercise political power with the consent of the people, to the extent delegated or restricted by the people. The Michigan Declaration of Rights⁵ is “drawn to restrict governmental conduct and to provide protection from governmental infringement and excesses.” *Sitz v Department of State Police*, 443 Mich 744, 760; 506 NW2d 209 (1993), quoting *Woodland v Citizens Lobby*, 423 Mich 188, 204; 378 N.W.2d 337 (1985).

Political power is exercised by the people primarily by casting votes at an election. “It is needless to explain that under [the general elective system of the constitution] the whole scheme of government, in every department, depends upon the action of the qualified voters in their electoral districts.” *Attorney General v Detroit Bd of Councilmen*, 58 Mich 213, 216; 24 NW 887 (1885). Accordingly, in addition to the right to exercise political power, Michigan’s

⁵ Const 1963, art 1, § 1 is the first section of the Michigan Declaration of Rights.

Constitution also enshrines the right to vote. All Michigan residents who are United States citizens, 18 years of age, and who have resided in Michigan for at least six months possess a constitutionally guaranteed right to vote, unless otherwise specifically prohibited:

Every citizen of the United States who has attained the age of 21 years⁶, who has resided in this state six months, and who meets the requirements of local residence provided by law, ***shall be an elector and qualified to vote in any election except as otherwise provided in this constitution.*** The legislature shall define residence for voting purposes.

Const 1963, art 2, § 1 (emphasis added).

The fundamental and paramount nature of the right to vote has long been recognized by this Court. In *Attorney General v City of Detroit*, 78 Mich 545, 563; 44 NW 388 (1889) voting was described as the “highest exercise of the freeman’s will”. More recently, the Court commented, “[w]ithout exaggeration the right to vote is one of the most precious, if not the most precious of all of our rights.” *Wilkins v Ann Arbor Clerk*, 385 Mich 670, 680; 189 NW2d 423 (1971). The U.S. Supreme Court also has recognized the important nature of the right to vote:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. [*Wesberry v Sanders*, 376 US 1, 17-18; 84 S Ct 526; 11 L Ed 2d 481 (1964).]

B. Authority of legislature to regulate voting by statute is limited by Const 1963, art 2, § 1.

The plain language of Const 1963, art 2, § 1 therefore clearly mandates that an individual meeting constitutional qualifications must be authorized to vote, unless the Constitution specifically provides otherwise.⁷ The legislature is without authority to add additional

⁶ This is now 18 years as a result of the adoption of US Const, Am XXVI.

⁷ See, for example, Const 1963, art 2, § 2 (authorizing the exclusion from voting due to mental incompetence or commitment to a jail or penal institution).

qualifications to restrict the exercise of political power by the people. The scope of the legislature's statutory authority with regard to voting qualifications is expressly defined and restricted by the people. Const 1963, art 2, § 1 authorizes the legislature to define residence for voting purposes. Const 1963, art 2, § 4 requires the legislature to enact laws regulating the time, place, and manner of elections, subject to constitutional limitations. The legislature also is charged with enacting laws to "preserve the purity of elections"⁸, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Const 1963, art 2, § 4. Despite the grant of authority to regulate elections by statute, the legislature still must proceed within constitutional strictures:

The laws to regulate elections, and to preserve their purity, and to guard against abuses of the elective franchise, must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert and impede, the exercise of the right to vote. [*City of Detroit, supra*, p 552-553.].

See also, *Detroit Bd of Councilmen*, *supra*, p 216 (holding nothing in the Constitution permits legislature seeking to purify elections to impose conditions that destroy or seriously impede enjoyment of the elective franchise), and *Warren v Bd of Registration*, 72 Mich 398, 406-407; 40 NW 553 (1888) (remembering that right of voting is one which cannot be taken away by direct law or impossible conditions and that "primary rule of elections must always be to save the voter his rights").

C. Restrictions on voting beyond constitutional qualifications are subject to strict judicial Scrutiny and compelling governmental interest must be demonstrated.

Because the photo identification requirements under § 523(1) impose additional requirements that impede the ability of a qualified voter to cast a ballot at an election, the

⁸ The phrase "purity of elections" does not have a single precise meaning. *Wells v Kent Co Bd of Election Comm'rs*, 382 Mich 112, 123; 168 NW2d 222 (1969). However, "it unmistakably requires. . .fairness and evenhandedness in the election laws of this state." *Socialist Workers Party v Secretary of State*, 412 Mich 571, 589, 317 NW2d 1 (1982).

requirements clearly affect the right to vote. This Court has previously held that if a state law imposes additional requirements for voting beyond those established in Const 1963, art 2, § 1, a standard of strict judicial scrutiny is applicable and a compelling state interest must be demonstrated. *Michigan State UAW CAP v Secretary of State*, 387 Mich 506, 514; 198 N.W.2d 385 (1972); *Wilkins, supra*, p ____; *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 465; 242 NW2d 3 (1976) (requiring that regulation of elections be closely examined when infringing on fundamental constitutionally guaranteed freedoms, even when such regulations are a permissible legislative activity).

The strict scrutiny standard extends to laws regulating elections adopted within the scope of legislative authority granted under Const 1963, art 2, § 4. *UAW CAP, supra*, p 515-516. The standard also requires that a compelling state interest is required to justify a law passed under Const 1963, art 2, § 4:

The authority of the legislature to set up a system of voter registration is not in question. However, any law passed pursuant to this constitutional authority does place a burden on the right to vote. . . . Therefore, the State must demonstrate a compelling state interest to justify a law passed pursuant to this section. [*UAW CAP, supra*, p 515-516.]

Unlike the standard applicable to the analysis of applied in some federal Equal Protection cases, the strict judicial scrutiny standard adopted by Michigan courts in cases involving Const 1963, art 2, § 1 and Const 1963, art 2, § 4 does not appear to require any assessment of the severity of the burden placed on the right to vote in order to determine whether the burden is sufficiently severe to warrant application of strict scrutiny. To the contrary, “[a]ny burden, however small, will not be permitted unless there is a compelling state interest.” *UAW CAP, supra*, p 516. Accordingly, for the photo identification requirements under § 532(1) to withstand

constitutional scrutiny, the requirements must advance a compelling state interest and may not impose a burden upon the right to vote.

D. Potential to prevent impersonation fraud at elections insufficient justification given that objectives can be secured with less restrictive measures.

While proponents of implementation of the photo identification requirements under § 523(1) may contend that the requirements are necessary to prevent voter fraud, the fact that the photo identification requirements have the potential to accomplish that purported objective is not sufficient to demonstrate a compelling state interest. A statute that infringes a fundamental right, such as the right to vote, to solve a legitimate and compelling need must be precise in its regulation. *UAW CAP*, *supra*, p 517, citing *United States v Robel*, 389 US 258, 265; 88 S Ct 419, 19 L Ed 2d 508 (1967), and *NAACP v Button*, 371 US 415, 438; 83 S Ct 328; 9 L Ed 2d 405 (1963). The burden then is upon the state to demonstrate that a regulation impacting the right to vote is necessary and essential and not achievable by less drastic means. The right to vote may be limited no more than is necessary to effectuate the state's interest.

The objectives advanced by the proponents of implementation of the photo identification requirements contained in § 523(1) certainly may be achieved by less drastic and more limited means that do not threaten the disenfranchisement of the estimated 370,000 to 745,100 qualified registered voters in Michigan who currently lack state-issued photo identification cards or driver's licenses. The Secretary of State estimates that 370,000 of Michigan's registered voters lack a state-issued driver's license or photo identification card.⁹ The Michigan Director of Elections has estimated that ten percent of Michigan's voting age citizens lack a driver's license

⁹ Dawson Bell, *Court jumps into dispute over voter ID checks*, Detroit Free Press, April 27, 2006
<<http://www.freep.com/apps/pbcs.dll/article?AID=/20060427/NEWS06/604270623&template=printart>> (accessed July 17, 2006) (quoting Secretary of State spokeswoman Kelly Chesney).

or non-driver's photo identification card.¹⁰ Given that the Secretary of State reports the total voting age population of the State of Michigan in 2004 as 7,541,000 people, ten percent of the voting population equals 754,100 potential voters.¹¹

E. Election Law includes comprehensive set of safeguards to prevent voter fraud.

Michigan's Election Law already includes a comprehensive set of safeguards to prevent fraudulent voting. Chapter XXIII of the Election Law, MCL 168.491 to 168.524, establishes a comprehensive system for the registration of voters and authorizes both local election officials and officials within the Department of State to register voters. See, for example:

- MCL 168.495 (providing for execution of an affidavit at time of registration);
- MCL 168.496 (requiring Secretary of State to make proper registration forms available);
- MCL 168.499 (authorizing local election officials to administer oaths and swear persons as to truth of statements in voter registration applications and providing misdemeanor penalties);
- MCL 168.500c (mandating the issuance of voter identification cards);
- MCL 168.500d (requiring local election officials to allow a qualified voter with a validated voter registration receipt to vote);

¹⁰ Spencer Overton, *Voter Identification*, (<http://www.stealingdemocracy.com/OvertonVoterID6-7-06.pdf>) (accessed July 17, 2006) (publication forthcoming in *University of Michigan Law Review*, December 2006), p 61, n 202 (citing Brennan Center Tel Conf with Christopher Thomas, Michigan Director of Elections, September 21, 2004).

¹¹ Michigan Department of State, *Voter Registration and Election Turnout Statistics*, <<http://www.michigan.gov/sos/0,1607,7-127-1583-29616--,00.html>> (accessed July 17, 2006).

- MCL 168.500e (requiring local election officials to forward notice of cancellation to local election officials in voter's prior jurisdiction when voter registers in new jurisdiction);
- MCL 168.500h (requiring the Secretary of State to notify local clerks of change of address, death notices, and names of drivers issued a license in other states);
- MCL 168.501 (mandating the filing of original voter registration cards alphabetically in a master file);
- MCL 168.505 (imposing duty upon local election official to ascertain if applicant is registered to vote elsewhere and require execution of documents to cancel prior registration);
- MCL 168.506 (establishing procedures for transfer of voter registrations when a registered voter moves within a city, village, or township);
- MCL 168.507 (requiring comparison of signatures for registration transfers);
- MCL 168.509m (establishing a statewide qualified voter file consisting of all qualified voters to enhance the uniformity of the administration of elections, increase efficiency and decrease the public cost of maintaining voter registration files, increase integrity of the voting process by creating a single qualified voter file that will permit the name of each qualified voter to appear only once, and to apply technology and information gathered in a manner that accurate and current records of qualified voters are maintained);
- MCL 168.509o (establishing a qualified voter file as the official file for the conduct of elections and prohibiting an address other than the address in official election files from being placed in the qualified voter file);

- MCL 168.509q (requiring the qualified voter file to contain personally identifiable information about each qualified voter included, including the most recent digitized signature of the voter);
- MCL 168.509r (allowing a qualified voter to be placed in the qualified voter file only if the voter attests that he or she is at least 17½ years of age or older, a United States citizen, and is a resident of the city or township where the voter's street address is located);
- MCL 168.509t (authorizing voter registration consistent with the requirements of the federal National Voter Registration Act and requiring first-time voters to vote in person and provide identification required under Section 303 of the Help America Vote Act of 2002, 42 USC 13483);
- MCL 168.509w (requiring validation of voter registration applications);
- MCL 168.509z (requiring the Secretary of State to notify local election officials of address changes for qualified voters, of persons issued a driver's license in another state, and death notices received by the Secretary of State);
- MCL 168.509aa (authorizing local election officials to use information from the U.S. Postal Service or other reliable information that identifies registered voters whose address may have changed and requiring local election officials to notify voters when the information indicating a change of address is received);
- MCL 168.509cc (providing for challenge of voter registration and authorizing cancellation of challenged registration);
- MCL 168.509dd (permitting local election officials to conduct a program to remove the names of voters no longer qualified to vote in the jurisdiction);

- MCL 168.509hh (permitting the use of digitized signatures in the qualified voter file);
- MCL 168.510 (requiring county clerks to forward death notices on a monthly basis and local election officials to cancel registration of deceased voters);
- MCL 168.512 (authorizing process for the challenge by affidavit of the registration of any registered voter);
- MCL 168.514 (mandating the destruction of registration cards by burning upon cancellation of registration);
- MCL 168.515 (authorizing house-to-house canvassing by local election officials to check correctness of registration records);
- MCL 168.519 (prohibiting registration by local election officials of a person believed to be unqualified, with misdemeanor penalties for violation);
- MCL 168.520 (authorizing local election and law enforcement officials to investigate illegal or fraudulent registrations); and
- MCL 168.521 (requiring local election officials to remove the name of a registration illegally or fraudulently included in voter registration records and to notify the affected person).

The cited provisions of the Election Law establish an extensive range of requirements imposed to prevent voter fraud and ensure that only qualified voters are allowed to vote in Michigan. These statutes already provide mechanisms intended to prevent voter fraud less intrusive than requiring a voter to produce government-issued photo identification at the polling place.

1. **Legislature has included within § 523(1) itself two other methods to combat impersonation fraud at elections that are less burdensome than photo identification requirements.**

The photo identification requirements under § 523(1) do not address fraud generally, but instead address a single type of alleged voter fraud involving impersonation by an imposter of a registered voter at the polls at an election. The photo identification requirements do not address other types of potential voter fraud. Notably, the legislature has included within § 523(1) itself two additional mechanisms designed to accomplish the same objective as the photo identification requirements, thereby assuring that an individual seeking to vote at an election is the qualified voter that he or she claims. First, the signature submitted by a registered voter at the polling place can be compared by local election officials with the digitized signature of the voter included in the qualified voter file:

. . . If an elector's signature contained in the qualified voter file is available in the polling place, the election official shall compare the signature upon the application with the digitized signature provided by the qualified voter file. . . [§ 523(1).]

Second, if voter registration lists are used in the precinct, election officials are required to determine if the name of the voter appears on the list and may require the voter to provide his or her date of birth to verify the voter's identity. § 523(1) provides, in pertinent part:

If voter registration lists are used in the precinct, the election inspector shall determine if the name on the application to vote appears on the voter registration list. If the name appears on the voter registration list, the elector shall provide further identification by giving his or her date of birth or other information stated upon the voter registration list. In precincts using voter registration lists, the date of birth may be required to be placed on the application to vote.

Moreover, proponents of implementation of the photo identification requirements can point to no recent documented fraud involving in-person voting in Michigan. As both a former attorney general and the current head of the executive branch of state government, *Amicus Curiae* is

aware of no such fraud in this state since 1999.¹² In OAG, No 6930, *supra*, p 3, Attorney General Kelley, who served in that capacity from 1961 to 1999, indicated:

As the chief law enforcement official of the State of Michigan, I am not aware of any substantial voter fraud in Michigan's elections. I have not received complaints regarding voter fraud. Moreover, the state's chief election official, Secretary of State Candice Miller, confirmed the fact that Michigan does not have a voter fraud problem when she stated: 'We have no real evidence of voter fraud in Michigan. Michigan has historically had very clean elections.'

Michigan's lack of experience with substantial voter fraud is consistent with national patterns. A study of alleged election fraud conducted in 2003 revealed that election fraud is "very rare," not more than a "minor problem," and "rarely affects election outcomes" and that wrongful disenfranchisement of voters was a far bigger problem than voter fraud as a whole. Lorraine Minnite and David Callahan, *Securing the Vote: An Analysis of Election Fraud* (2003) <http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf> (accessed July 17, 2006. *Amicus Curiae* is aware of no evidence that in-person voter fraud by imposters at an election is anything other than a hypothetical or speculative problem in Michigan.

It is, therefore, difficult to contend that the photo identification requirements § 523(1) must be implemented in order to prevent fraud given the alternative methods for accomplishing the same objective already authorized by the legislature, the fact that Michigan previously has not mandated production of photo identification prior to voting, the lack of documented in-person voting fraud in Michigan, and the lack of a mandatory photo identification requirements for voting in other states. In addition, there are numerous valid reasons why a registered voter may lack a state-issued photo identification card. For example, a voter may have no need for a

¹² Amicus is aware of several relatively recent anecdotal examples of inappropriate conduct relating to absentee ballots (including criminal convictions) and allegations regarding improper voter registration using the mail, but none of these examples relate to the type of fraud the proponents of the imposition of photo identification requirements seek to prevent—impersonation of registered voters at the polls by imposters.

card or no means to pay for a state-issued identification card. A voter may forget to bring the card to the polling place, or lose the card. Other means for establishing identity at the polls are less likely to negatively impact qualified voters. Unlike a photo identification card, every voter has a date of birth, which can be compared against voting records. Use of a date of birth for these purposes is specifically provided under § 523(1), as is comparison against a digitized signature, and every registered voter submits a signature or mark at the time of registration. Taken together, these factors all indicate the lack of a compelling state interest for the imposition of the photo identification requirements included in § 523(1). Accordingly, the photo identification requirements included in § 523(1) are unconstitutional under Const 1963, art 2, § 1.

F. Determination that photo identification requirements are not supported by a compelling governmental interest and therefore unconstitutional consistent with longstanding precedent.

Such a conclusion is consistent with the decision of this Court in a similar case decided nearly 120 years ago. In *City of Detroit, supra*, this Court considered the constitutionality of an act to “preserve the purity of elections, and guard against abuses of the elective franchise, in the city of Detroit.” The law required a naturalized citizen seeking to vote in the city of Detroit to produce a naturalization certificate or show by some evidence other than his own that the naturalization certificate had been issued. In contrast, a second category of voters, natural-born citizens, were not required to produce such a certificate when voting. The Court found the law unconstitutional, holding:

The object of a registry law, or of any law to preserve the purity of the ballot-box, and to guard against abuses of the elective franchise, is not to prevent any qualified elector from voting, or to unnecessarily hinder or impair his privilege. It is for the purpose of preventing fraudulent voting. ***In order to prevent fraud at the ballot-box***, it is proper and legal that all needful rules and regulations be made to that end; but ***it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. Nor can the legislature, in attempting, ostensibly, to prevent fraud, disfranchise legal voters without their own fault or negligence.***

The power of the legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise and by preventing its abuse. The right to vote must not be impaired by the regulation. [*City of Detroit, supra*, p 559-560. (emphasis added).]

The Court noted that the distinction between native-born and naturalized voters requiring naturalized voters to produce a naturalization certificate when appearing at an election was not only unfair; it was not necessary to prevent fraud. *City of Detroit, supra*, p 562. The decision in *City of Detroit* also suggests that the appropriate remedy for those seeking to prevent fraud by imposing a photo identification requirement is constitutional amendment, not legislative action:

If the legislature, under the pretext of regulation, can destroy this constitutional right by annexing an additional qualification as to the number of days such voter must reside within a precinct before he can vote therein, or any other requisite, in direct opposition to any of the constitutional requirements, then it can as well require of the elector, entirely new qualifications, independent of the constitution, before the right of suffrage can be exercised. ***If the exigencies of the times are such, which I do not believe, that a fair and honest election cannot be held in Detroit, or in any other place in our state, without other qualifications and restrictions upon both native-born and naturalized citizens than these now found in or authorized by the constitution, then the remedy is with the people to alter such constitution*** by the lawful methods pointed out and permitted by that instrument. This disposition to hamper and abridge the rights of the people to govern themselves, upon the theory that certain communities are unfit to control their own local affairs, which seems to be growing more prevalent in our legislative bodies in this country, must, nevertheless, if the idea be a correct one, be exercised in reason, and within constitutional limits. [*City of Detroit, supra*, p 562. (emphasis added).]

Because there is no compelling state interest justifying the imposition of the photo identification requirements under § 523(1), the requirements are an unconstitutional infringement on the right to vote guaranteed under Const 1963, art 2, § 1.

II. Photo identification requirements under § 523(1) violate the Equal Protection Clauses of the Michigan and U.S. Constitutions.

The Equal Protection Clause of the U.S. Constitution provides, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [US Const, Am XIV.]

Because the right to vote is a fundamental constitutional right, under the Equal Protection Clause, any significant burden imposed upon exercise of that right must withstand strict judicial scrutiny. The photo identification requirements under § 523(1), on their face, fail to satisfy this test. The requirements cannot be justified by a purported general desire to prevent voter fraud in Michigan. Evidence of significant fraud involving voter impersonation at the polls in Michigan is lacking and other mechanisms to prevent fraud are in place. Consequently, no compelling governmental interest justifies imposition of the photo identification restrictions imposed by § 523(1).

A. Voting is a fundamental constitutional right and interference with the exercise of that right must withstand strict judicial scrutiny.

Because the right to vote is paramount and fundamental constitutional right, restrictions on the right to vote courts considering whether restrictions on voting violate the Equal Protection Clause consistently have applied a standard of strict judicial scrutiny. In *Dunn v Blumstein*, 405 US 330; 92 S Ct 995; 31 L Ed 2d 274 (1972), the U.S. Supreme Court applies a strict scrutiny analysis to a durational residency requirement for voting. The Court explained the strict scrutiny standard in *Reynolds v Sims*, 377 US 533, 561-562; 84 S Ct 1362; 12 L Ed 2d; 506 (1964):

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, ***any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.*** [emphasis added.]

Some have argued that the scope of the examination of a state election law or regulation depends on the extent to which the provision burdens Fourteenth Amendment rights, and relying upon the U.S. Supreme Court Decision in *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992), would instead balance voting rights with the character and magnitude of the

burden imposed upon those rights. This argument was recently rejected by in *Stewart v Blackwell*, 444 F3d 843 (CA 6 2006). The issue before the Court *Burdick* involved a state restriction on votes for write-in candidates. But, as noted by the court in *Stewart*, the issue before the Court in *Burdick* was the right of a candidate to appear on the ballot, not access to the ballot box by a citizen, as was the case in *Stewart*. In response to allegations that Ohio's differential use of voting technology violated the Equal Protection Clause, the Court in *Stewart* applied strict scrutiny, not the relaxed balancing test outlined in *Burdick*: "Supreme Court precedent is clear: we must apply strict scrutiny to the challenged voting practice at issue here." *Stewart, supra*, p 862).

Furthermore, Michigan case law involving equal protection and the right to vote under the Equal Protection Clause of Const 1963, art 1, § 2, buttresses the notion that the strict scrutiny standard must be applied, with restrictions on voting rights narrowly tailored to advance a compelling governmental interest. In *Wilkins, supra*, this Court applied a strict scrutiny standard to residency requirements for student voters and required demonstration of a compelling governmental interest to justify the requirements. Actual denial of the right to vote is not required. "The Equal Protection Clause guards against subtle restraints on the right to vote, as well as outright denial." *Wilkins, supra*, p 684. Attorney General Kelley was right to apply strict scrutiny to the photo identification requirements under § 523(1) as the most exacting level of scrutiny must be applied to the requirements. OAG, No 6930, *supra*.

B. Photo identification requirements under § 523(1) burden the fundamental right to vote.

The burdens imposed by the photo identification requirements under § 523(1) are severe. Between 370,000 and 745,100 registered voters lack the required photo identification or driver's license, and imposition of the photo identification requirements will diminish their opportunity to

participate in the political process. What is particularly pernicious about the photo identification requirement is that it is so insidious. To the average voter, it no doubt seems perfectly reasonable to expect that every citizen will have ready access to a photo identification card. But in fact, there are a significant number of citizens constitutionally entitled to vote who do not possess such an identification card and lack the means to obtain one. For many of these citizens the financial and practical barriers to obtaining a government-approved photo identification are prohibitive.

1. Photo identification requirements impose costs and financial burdens upon a significant segment of the voting population.

For example, there are qualified voters who are too poor to own a car, too disabled to drive, who have lost the ability to drive due to increasing age, or otherwise lack mobility. These citizens have no need for a driver's license and, not infrequently, may lack the means to travel to appear in person at an office operated by the Secretary of State. They may not have the ability to pass the physical requirements required by state law or even the money required to purchase a license. A driver's license costs \$25, MCL 257.811, and is subject to additional renewal and replacement fees. A chauffer's license, also subject to renewal and replacement fees, costs \$35, MCL 257.811.

Even the less expensive official state identification card is problematic for some of our citizens. While the nominal cost of that card is only \$10, MCL 28.292, the card must be renewed ever four years and these amounts can be prohibitive to the poorest of our citizens. The real cost to obtain a state identification card is actually significantly higher than \$10. To obtain the card, an individual must present other identification material, such as a birth certificate. A citizen seeking to obtain a certified copy of a birth certificate will incur additional fees. Michigan voters

born in other states and countries face even greater hurdles to obtaining a copy of a birth certificate required to obtain an operator's license or state identification card.

2. Affidavit and challenge provisions impose time constraints, burden voters, and may result in denial of right to vote.

In addition to the financial and practical impediments, the alternative to the mandatory presentation of photo identification cards by voters allowed under § 523(1) also is burdensome and constitutes an additional obstacle to voting. Requiring a voter without the mandated photo identification card to execute an affidavit under penalty of perjury and subjecting that voter to challenge is not an equal or adequate substitute. Processing a voter without photo identification subjects the voter to delay and potential denial of the right to vote at the discretion of local election officials. Under the Election Law, challenged voters are segregated from other qualified voters and forced to the back of the line:

If at the time a person proposing to vote is challenged, there are several persons awaiting their turn to vote, said challenged person shall stand to one side until after unchallenged voters have had an opportunity to vote, when his case shall be taken up and disposed of.

MCL 168.728. A challenged voter also is subject to questioning under oath concerning his or her qualifications as a voter by any election inspector or by other voters in the polling place.

MCL 168.729. Only if the voter's answers to the questions demonstrate to election officials that the voter without photo identification is a qualified voter in that precinct may the voter be issued a ballot. MCL 168.729. Finally, if a challenged voter is issued a ballot, election officials are required to mark the ballot with a number corresponding to the number placed after the voter's name in the poll list and if the ballot cannot be marked, a ballot may not be issued. MCL

168.745. These requirements result in disparate treatment of voters without photo identification resulting in either the delay or the denial of their right to vote. While voting by absentee ballot may offer an alternative to avoid the photo identification requirements applicable to in-person

voting in some circumstances, voting by absentee ballot also is not an adequate substitute.

Absentee ballots are not available to all voters¹³ and may not be issued at the polls on Election Day.

Given the numerous previously detailed safeguards in the Election Law designed to ensure the purity of the election process in this state, imposition of the additional requirement to produce photo identification is not necessary to insure the prevention of in-person voter fraud or preserve the purity of Michigan elections and does not satisfy the applicable compelling state interest standard. While requiring voters appearing at an election to produce government-authorized photo identification may have been viewed by some within the legislative branch as a helpful way to reduce potential instances of impersonation fraud at the polls on Election Day, the promise of potential assistance in reducing fraud involving impersonation of registered voters at the polls fraud is not sufficient to justify imposing additional new burdens on Michigan voters. As this Court has recognized:

We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with some evil. [*Wilkins, supra*, p 685, quoting *UMW of America, Dist 12 v Illinois State Bar Assn*, 389 US 217, 222; 88 S Ct 353, 19 L Ed 2d 426 (1967).]

C. In-person voters arbitrarily treated differently under § 523(1) than absentee voters.

The necessity of the photo identification requirements under § 523(1) is further mitigated by the fact that the requirements apply only to in-person voting. This disparate treatment of

¹³ Absentee ballots may only be issued to a voter who: (1) has a physical disability and cannot attend the polls without assistance; (2) cannot attend the polls on account of religious tenets; (3) cannot attend the polls because of service as an election inspector in another precinct; (4) is 60 years or older; (5) is absent or expects to be absent from city or township of resident during entire time polls are open; or (6) is confined in jail awaiting trial or arraignment. MCL 168.758. A majority of other states allow no-excuse absentee voting. Michigan does not.

different classes of voters also runs afoul of the Equal Protection Clause. In Michigan, a voter casting an absentee ballot is not required to present any identification, even when delivering a ballot in person to an election official. Under MCL 168.759, to obtain an absentee ballot, a voter simply must declare in writing on an application that he or she is a qualified and registered voter in the city, village, or township in which she is registered, provide an address for delivery of the ballot, and sign a copy of the application. The signature submitted is compared to the signature of the voter in either the qualified voter file or other records of the local election official. MCL 168.761. No photo identification is used to verify the identity of a voter casting an absentee ballot. While some qualified voters might utilize the absentee ballot process to avoid the more onerous photo identification requirements established under § 523(1), not all voters are eligible to cast absentee ballots. Absentee ballots may only be issued to a voter who: (1) has a physical disability and cannot attend the polls without assistance; (2) cannot attend the polls on account of religious tenets; (3) cannot attend the polls because of service as an election inspector in another precinct; (4) is 60 years or older; (5) is absent or expects to be absent from the city or township of residence during the entire time polls are open; or (6) is confined in jail awaiting trial or arraignment. MCL 168.758. Only voters meeting these statutory criteria may vote by absentee ballot. Voters not eligible to vote by absentee ballot must vote in person at the polls and are subject to the photo identification requirements imposed under § 523(1). The notion that the photo identification requirements under § 523(1) are necessary to advance a governmental interest in the prevention of voter fraud is severely undermined by the fact that the photo identification requirements apply only to select voters. An entire class of voters, absentee voters, is not subject to photo identification requirements.

The disparate treatment of in-person and absentee voters is arbitrary. Similar arbitrary distinctions among voters have been rejected in the past. For example, residency restrictions applicable only to students have been determined to violate the Equal Protection Clauses of the U.S. and Michigan Constitution:

In the future, students must be treated the same as all other registrants. No special questions, forms, identification, etc. may be required of students. [*Wilkins, supra*, p 694.]

Simply put, arbitrary differential treatment in the voting process violates the Equal Protection Clause:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. [*Bush v Gore*, 531 US 98, 104-105; 121 S Ct 525; 148 L Ed 2d 388 (2000).]

Qualified voters seeking to vote in-person on Election Day must be treated the same as all other registrants, including those voting by absentee ballot. No special questions, forms, identification, etc. may be required of qualified voters seeking to vote in person on Election Day. *Wilkins, supra*, p 694.

D. Photo identification requirements under § 523(1) fail to withstand more relaxed equal protection scrutiny.

Even if the balancing test described in *Burdick, supra*, were applicable, and the restrictions on the right to vote imposed by the photo identification requirements under § 523(1) were considered less than severe, the legislature would not be relieved of its obligation to justify that imposition of the photo identification requirements outweighs the burden imposed upon voters. The test detailed in *Burdick, supra*, requires a balancing of the interests of voters in exercising their fundamental constitutional right to vote against the interests of the state imposing restrictions, taking into account the extent to which those interests make it necessary to

burden the rights of voters. *Burdick, supra*, p 434. The limited potential benefit in preventing potential in-person voting fraud simply does not outweigh the greater potential that photo identification requirements will impede or deny the constitutional right to vote of otherwise qualified voters.

For the foregoing reasons, the photo identification requirements under § 523(1) impose an unnecessary and undue burden on the exercise of the fundamental right to vote of many Michigan citizens who are fully eligible, registered, and qualified to vote, but who do not possess an official state identification card, an operator's license, or a chauffeur's license. The requirements cannot be justified by a purported general desire to prevent voter fraud in Michigan. Evidence of significant fraud involving voter impersonation at the polls in Michigan is lacking and other mechanisms to prevent fraud are in place. Consequently, there is no compelling reason to impose the restrictions contained in § 523(1). Michigan can control the potential for in-person voter fraud with less onerous and intrusive measures. By exempting absentee voters from the photo identification requirements, any potential benefit in preventing absentee ballot fraud is nullified. Burdening voters by requiring them to present a photo identification card before voting is a disproportionate response to potential in-person voter fraud and is neither reasonable nor non-discriminatory. Accordingly, the photo identification requirements imposed under § 523(1) violates the Equal Protection Clauses of the Michigan and U.S. Constitutions.

III. The photo identification requirements under § 523(1) violate the Due Process Clauses of the Michigan and U.S. Constitutions.

The photo identification requirements § 523 violates the due process clause of the Fourteenth Amendment¹⁴ and Const 1963, art 1, § 17 because the standards for acceptable

¹⁴ US Const, Am XIV, § 1, provides: "All persons born or naturalized in the United

identification are vague and grant constitutionally-prohibited discretion to local election officials.

Const 1963, art 1, § 17 provides:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

A. Constitutional guarantee of due process protects against arbitrary and capricious legislation.

The constitutional guarantee of due process includes “a limitation upon arbitrary power and a guarantee against arbitrary legislation demanding that the law shall not be unreasonable, arbitrary or capricious.” *Grubaugh v City of St. Johns*, 384 Mich 165, 170; 180 NW2d 778, (1970), citing 2 Cooley, *Constitutional Limitations* (8th ed), p 733. As a result, the courts have closely scrutinized laws that interfere with fundamental rights, such as the right to vote, to insure that they are not unduly vague or give local officials unfettered discretion. In cases involving voter registration, the U.S. Supreme Court has struck down state laws that grant unfettered discretion to local officials:

The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. [*Wilkins*, supra, p 677, quoting *Louisiana v United States*, 380 US 145, 153; 85 S Ct 817; 13 L Ed 2d 7090 (1965).]

B. Requirement under § 523(1) for “other generally recognized picture identification card” is vague and provides no guidance or standards for enforcement.

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Under § 523(1), a voter appearing at an election must present either an official state identification card issued under 1972 PA 222, an operator's or chauffer's license issued under the Vehicle Code, or "other generally recognized picture identification card". No further definition, guidance, or standards are provided under the statute to local election officials to be used in determining whether an identification card is or is not a "generally recognized picture identification card". Generally recognized by whom? The law provides no guidance. What must the picture identification card contain? The law provides no guidance. The failure of the legislature to define the term "other generally recognized picture identification" or provide additional standards renders the photo identification requirements included under § 523(1) unconstitutionally vague. As a result, an individual's right to vote is subject to the discretion of a local election official whose determination of whether a particular picture identification card constitutes a "generally recognized picture identification card." This language subjects the exercise of a fundamental constitutional right to the whim or impulse of an individual election official.

C. Court has established a three pronged test for determining whether a statute is unconstitutionally void for vagueness.

This Court has recognized three alternative grounds on which a statute may be determined unconstitutionally void for vagueness: "[1] if the statute is overbroad, impinging on First Amendment freedoms, or [2] does not provide fair notice of the conduct proscribed, or [3] is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. *Woll v Attorney General*, 409 Mich 500, 533; 297 NW2d 578 (1980), citing *Grayned v Rockford*, 408 US 104, 108-109, 92 S Ct 2294; 33 L Ed 2d 222 (1972). The "generally recognized picture identification card" requirement included in § 523(1) is void for vagueness based upon both the second and third grounds.

1. Photo identification requirements under § 523(1) do not provide fair notice of conduct described.

The phrase “generally recognized picture identification card” as used in § 523(1) is void for vagueness because it does not provide fair notice to a voter of the acceptable form of required photo identification. Applying the plain and ordinary meaning of the undefined term results in ultimate resolution being vested in the discretion of an election official. What one voter or election official recognizes as a generally recognized picture identification card may not be generally recognized by another. The statute therefore places the ordinary voter in the position of guessing whether a particular picture identification will be accepted as a “generally recognized picture identification card” by an election official or not. Under the plain language of the statute, voters and election officials can only debate what is or is not “generally recognized” and the language of the statute provides no guidance for resolution of such disputes. A qualified voter leaving for the polls cannot leave with any reasonable assurance from the plain language of the statute that his or her picture identification card will or will not be accepted as a “generally recognized picture identification card” at the polling place.

2. Photo identification requirements under § 523(1) confer unstructured and unlimited discretion upon local election officials.

The phrase also “generally recognized picture identification care” also is void for vagueness because it is so indefinite that it confers unstructured and unlimited discretion upon election officials to determine whether or not an identification card is a “generally recognized picture identification card”. The statute provides election officials with no guidance as to the type of identifying material that must be included on the card for it to constitute an identification card. No standard for recognition is provided. For example, a picture identification card generally recognized by the state government may not be recognized by the federal government. A card recognized for some purposes may not be recognized for all purposes. Under § 523(1),

the determination of what is or is not a “generally recognized picture identification card” is left to the complete discretion of election officials at polling places on Election Day. Because no further standard is provided, § 523(1) could create a situation where photo identification cards allowed in one precinct are not recognized in another or a situation where a particular identification card allowed by one official in the morning is denied by another in the afternoon.

The indefinite term “generally recognized picture identification card” stands in stark contrast to the other very specific types of photo identification also authorized under § 523(1). An identification card is either an official state identification card issued under 1972 PA 222, MCL 28.291 *et seq*, or not. An identification card is either an operator’s license or a chauffer’s license issued under the Vehicle Code, or not. Whether an identification card is or is not a “generally recognized picture identification card” is, without further guidance or standards, merely a matter of opinion. As a result, the photo identification requirements under § 523(1) are unconstitutionally void for vagueness.

IV. The photo identification requirements under § 523(1) constitute an impermissible poll tax prohibited by the U.S. Constitution.

Poll taxes are prohibited by US Const, Am XXIV, which provides “The right of citizens of the United States to vote in [federal election] shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.” In *Harper v Virginia State Bd of Elections*, 383 US 663, 666; 86 S Ct 1079; 16 L Ed 2d 50 (1966)¹⁵, the U.S. Supreme Court held that poll taxes may not be used to abridge the right to vote in state elections, declaring that “[v]oter qualifications have no relation to wealth....”

¹⁵ It is instructive to note that the poll tax struck down in *Harper* was only \$1.50, substantially less than the effective costs a voter must incur to obtain any of the state-approved photo identification cards required by § 523(1).

While the photo identification requirements imposed under § 523(1) are not a direct poll tax, the requirements effectively restrict the right to vote of those who are unable to pay for a state-approved photo identification card. This has the prohibited effect of restricting their right to vote based upon wealth—the functional equivalent of a poll tax. The Twenty-Fourth Amendment not only abolishes direct poll taxes, it prohibits milder substitutes and nullifies both sophisticated and simple-minded methods of impairing the right to vote. *Harman v Forssenius*, 380 US 528, 540-542; 85 S Ct 1177; 14 L Ed 2d 274 (1972). The fact that the fee for obtaining an identification card or driver's license in Michigan is designated as a "fee" and is imposed indirectly via the purchase of a card or license does not reduce its effective impact as a poll tax. "The Legislature may not do indirectly what it cannot do directly." *Blank v Dep't Corrections*, 222 Mich App 385, 397; 564 NW2d 130 (1997), citing *Brennan v Detroit Recorder*, 207 Mich 35, 39; 173 NW 511 (1919).

Recently, the federal District Court in *Common Cause v Billups*, 406 F Supp 2d 1326 (ND Ga 2005) determined that the fees and costs associated with obtaining the photo identification necessary to comply with a photo identification requirement in that state effectively amounted to a prohibited poll tax:

Because, as a practical matter, most voters who do not possess other forms of Photo ID must obtain a Photo ID card to exercise their right to vote, even though those voters have no other need for a Photo ID card, ***requiring those voters to purchase a Photo ID card effectively places a cost on the right to vote. In that respect, the Photo ID requirement runs afoul of the Twenty-fourth Amendment*** for federal elections and violates the Equal Protection Clause for State and municipal elections. [*Common Cause, supra*, p 1369 (emphasis added).]

Because the Michigan Legislature is prohibited by US Const, Am XXIV, from directly or indirectly impose a poll tax, the photo identification requirements included under § 523(1) are unconstitutional.

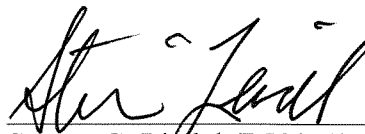
RELIEF REQUESTED

In Michigan, all political power is inherent in the people, and is not restricted to those possessing a government-approved photo identification card. If implemented, the photo identification requirements under § 523(1) would have the potentially unjustifiable effect of infringing the right to vote of otherwise qualified voters. Because of these constitutional infirmities and because the rights of Michigan citizens to participate in the electoral process will be diminished significantly, *Amicus Curiae* urges the Court to uphold Attorney General Kelley's opinion in OAG, No 6930, *supra*, and issue an opinion finding that the photo identification requirements contained in § 523(1) are unconstitutional and unenforceable.

Respectfully submitted,



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